No. 22,354

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

TELEDYNE, INC.,

Appellant,

v.

NATIONAL LABOR RELATIONS BOARD,

Appellee.

Appeal from the United States District Court of the Northern District of California

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APPELLANT'S OPENING BRIEF

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PRELIMINARY STATEMENT

The appellee, National Labor Relations Board (hereinafter called the "Board") is an administrative agency created by the National Labor Relations Act, as amended (hereinafter called the "Act"), 29 USC § 151, et. seq., and is empowered to administer the provisions of the Act. (R. 215.)*

The appellant is an employer engaged in the manufacture and sale of semiconductor devices for industry, and the United States Government to be used for defense

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*References designated "R" are to Volume 1 of the record herein.

purposes, in interstate commerce within the meaning of Sections 2(6) and (7) of the Act [29 USC § 152(6), (7)]. (R. 215.)

The district court had jurisdiction of this matter pursuant to Section 11(2) of the Act (29 USC § 161(2)). This Court has jurisdiction to hear appeals from final orders of the district courts pursuant to 28 USC § 1291.

In 1966, the Board promulgated a rule in *Excelsior Underwear, Inc.*, 156 NLRB 1236 (1966) (hereinafter called *"Excelsior"*), requiring employers in elections directed by the Board pursuant to Section 9 of the Act (29 USC § 159) to provide the Board, for the express purpose of transmission to the union seeking to organize its employees, a list of names and addresses of such employees (hereinafter called an *"Excelsior* list").

In this case, the Board caused a subpoena duces tecum requiring production of an *Excelsior* list to be served on the appellant. The district court, under Section 11 of the Act (29 USC § 161), ordered appellant to comply with said subpoena.

It will be shown herein that whether or not the *Excelsior* rule is valid, the subpoena is unenforceable under Section 11 of the Act. It will further be shown that the *Excelsior* rule is not authorized by the Act, and is violative of constitutionally protected rights.

STATEMENT OF FACTS

On November 3, 1966, the International Association of Machinists and Aerospace Workers, AFL-CIO, Local Lodge No. 1327 (hereinafter called the "Union"), filed a petition with the 20th Region of the Board in San Francisco, California, seeking an election to establish its

majority status in a unit of the appellant's production and maintenance employees. Included in the unit are highly skilled employees, who are difficult to find and hire. The Union represents employees of companies that compete with appellant for such skilled employees, and other employees. (R. 215.)

On or about November 10, 1966, the appellant furnished to the Board a list of the names of all employees in the unit, together with their respective job classifications, for the Board to ascertain whether the petition was supported by 30% of the employees in the unit. On or about November 22, 1966, the Board informed the appellant that the petition was supported by 30% of the employees in the unit. (R. 216.)

On or about November 22, 1966, the appellant advised its employees that there was no rule prohibiting solicitation, or distribution of literature, on working time by employees, and that employees were free to discuss all aspects of unionism and to solicit their fellow employees to vote for or against the Union, on working time, so long as production was not interfered with. The appellant further advised its employees that they were free to distribute literature, for or against the Union, in non-working areas of the plant, such as in the lunchroom and in parking lots. (R. 216.)

On November 29, 1966, following a hearing on the question of representation, the Regional Director for the 20th Region (hereinafter called the "Regional Director"), issued a Decision and Direction of Election setting the election for December 23, 1966. The Regional Director also directed the defendant to furnish him two copies of an *Excelsior* list. (R. 216.)

On or about December 2, 1966, the appellant advised its employees that they could furnish the Board with two

copies of their names and addresses, and gave them a stamped envelope addressed to the Board which they could privately use for this purpose. Appellant further advised its employees that it does not give employees' addresses to third parties without the employees' consent. (R. 217.)

On or about December 3, 1966, the appellant offered to have, at its own expense, a disinterested thirty party, such as the American Arbitration Association, receive from it the names and addresses of all eligible employees, and at any time thereafter during the pre-election period, receive from the Union its communications in stamped envelopes so that such disinterested third party could affix the names and addresses thereto and mail them to the appellant's employees' homes for the Union. The Union was advised of this offer. At no time during the period from December 3, 1966, to date, has the Union shown any interest in, or accepted said offer. (R. 217.)

On December 3, 1966, the appellant offered to prepare an alphabetical list of the names and classifications of all eligible employees, and agreed to make such list available to the Regional Director, and the Union for inspection a reasonable time prior to the election, and for use during the election. On or about December 22, 1966, at the pre-election conference held by the Board, the eligibility list of the names and classifications of all employees was made available to the Board and the Union. Such eligibility list was used by the Board in the conduct of the election on December 23, 1966. (R. 217-218.)

During the pre-election period the Union campaigned and distributed numerous communications to appellant's employees. (R. 218.)

On December 23, 1966, an election was held. The appellant won the election by a margin of 648 votes in its favor to 124 votes in favor of the Union. (29 ballots were challenged.) (R. 218.)

On December 28, 1966, the Union filed objections to the election. The Regional Director, in a Supplemental Decision and Order dated January 17, 1967, ruled that the election of December 23, 1966, be set aside and ordered that a new election be held because the appellant had not complied with *Excelsior*. A second election was scheduled for June 15, 1967. The Regional Director also issued a new order that the defendant produce an *Excelsior* list. (R. 218.)

On May 31, 1967, the Regional Director caused to be served on the appellant a subpoena duces tecum directing it to produce either an *Excelsior* list, or its personnel and payroll records. The appellant then filed, with the Board, a petition to revoke the subpoena. The petition was denied. (R. 218-219.)

The second election scheduled for June 15, 1967, was indefinitely postponed by the Board after the appellant refused to voluntarily comply with the subpoena. (R. 219.)

With respect to the second election, the appellant took the following actions, which it had already taken in the first election, to make effective means of communication available to the Union, and informed the Board and the Union thereof:

(a) It again informed the Board that its employees had the right to solicit on working time and to distribute literature for or against the Union.

(b) It offered to again furnish each employee means to privately make his name and address available to the Board and the Union.

(c) It again offered to provide, at its expense, an independent agency to mail Union communications to employees' homes.

(d) It again offered to provide a list of names of employees eligible to vote to the Board and the Union for inspection, and use, a reasonable time before the election. (R. 219.)

On September 20, 1967, the instant action was commenced to enforce the subpoena duces tecum, and on October 11, 1967, the appellant was ordered by the district court to comply therewith.

SPECIFICATION OF ERRORS

1. The district court erred in ruling that the instant subpoena duces tecum called for the production of "evidence" within the meaning of Section 11 of the Act (29 U.S.C. § 161).

2. The district court erred in ordering the appellant to comply with the subpoena duces tecum pursuant to Section 11 of the Act (29 U.S.C. § 161(2)).

3. The district court erred in holding that as applied in the instant case, the *Excelsior* rule is valid.

ARGUMENT

I. IRRESPECTIVE OF WHETHER THE *EXCELSIOR* RULE IS VALID, THE SUBPOENA IS UNENFORCEABLE BECAUSE IT DOES NOT CALL FOR THE PRODUCTION OF EVIDENCE TO BE USED BY THE BOARD.

The District Court enforced the subpoena pursuant to Section 11 of the Act (29 USC § 161). Section 11 provides, in pertinent part, as follows:

"SEC. 11. For the purpose of all hearings and investigations, which, in the opinion of the Board, are necessary and proper for the exercise of the powers vested in it by section 9 and section 10 —

"(1) The Board, or its duly authorized agents or agencies, shall at all reasonable times have access to, for the purpose of examination, and the right to copy any evidence of any person being investigated or proceeded against that relates to any matter under investigation or in question. The Board, or any member thereof, shall upon application of any party to such proceedings, forthwith issue to such party subpenas requiring the attendance and testimony of witnesses or the production of any evidence in such proceeding or investigation requested in such application . . .

"(2) In case of contumacy or refusal to obey a subpena issued to any person, any district court of the United States or the United States courts of any Territory or possession, or the District Court of the United States for the District of Columbia, within the jurisdiction of which the inquiry is carried on or within the jurisdiction of which said person guilty of contumacy or refusal to obey is found or resides or transacts business, upon application by the Board shall have jurisdiction to issue to such person an order requiring such person to appear before the Board, its member, agent, or agency, there to produce evidence if so ordered, or there to give testimony touching the matter under investigation or in question; and any failure to obey such order of the court may be punished by said court as a contempt thereof." (29 USC § 161.)

While Section 11 grants the Board discretion in deciding whether an investigation is necessary and proper for

the exercise of power vested in it by Sections 9 and 10 of the Act, the only subpoenas authorized by Section 11 are those which call for the production of "evidence," and are for the purpose of such a hearing or investigation.

The legislative history of Section 11 indicates legislative concern about the Board conducting a "roving commission" by subpoena, and there was a conscious effort to prevent this from occurring. II Legislative History of NLRA 2932, 2978-79, 3076 (1935); H. Rep. No. 969, 74th Cong., 1st Sess. 22 (1935); H. Rep. No. 972, 74th Cong., 1st Sess. 22 (1935); H. Rep. No. 1147, 74th Cong., 1st Sess. 25 (1935).

The present Section 11 is virtually identical with Section 11 of the original National Labor Relations Act. The purpose of said section is to give:

> ". . . to the Board in connection with those issues in which it has compulsory power (that is, the prevention of unfair labor practices and the choice of representatives . . .) the usual powers to take testimony *germane to the matter under investigation. . . .*" (Emphasis added.) (I Legislative History of the National Labor Relations Act 1935, 1108 (1935).)

The following exchange between Senator Wagner, draftsman of the original Act, and James W. Deffenbaugh, a representative of Hocking Glass Company, illustrates legislative intent to grant limited subpoena power under Section 11:

> "MR. DEFFENBAUGH: I do not believe it is fair . . . to permit quite such a wide latitude of the Board or agency to investigate any private business and make it produce all of the private records. I think the power there is too broad . . . .

> "SENATOR WAGNER: Of course, this examination you have referred to *can only be on matters which relate to the particular controversy and must be pertinent.*" (II Legislative History of the National Labor Relations Act 1935, 1891 (1935)) (Emphasis added)

Section 11 permits the Board to issue subpoenas which call for the production of "evidence". There is no definition of the word "evidence" in the Act, and when a word like "evidence" is used, it is presumed that Congress intended to use it in its technical meaning. "Legal terms in a statute are presumed to have been used in their legal sense." Sutherland, *Statutory Construction,* §4919, at 438-439, and cases cited therein (3d ed. 1943); see also, *Standard Oil Co. v. United States,* 221 U.S. 1, 59 (1910).

There is little difference between the various definitions of the word "evidence". Webster's Third New International Dictionary of the English Language (Unabridged) defines "evidence" as "something legally submitted to a competent tribunal as a means of ascertaining the truth of any alleged matter of fact under investigation before it." (p. 788) Black's Law Dictionary, Fourth Edition, defines the term as follows:

> "Any species of proof, or probative matter, legally presented at the trial of an issue, by the act of the parties and through the medium of witnesses, records, documents, concrete objects, etc., for the purpose of inducing belief in the minds of the court or jury as to their contention." (p. 656)

Corpus Juris Secundum defines "evidence" as follows:

> "Evidence broadly defined, is the means from which an inference may logically be drawn as to

> the existence of a fact; that which makes evident or plain. Evidence is the demonstration of a fact; it signifies that which demonstrates, makes clear, or ascertains the truth of the very fact or point in issue, either on the one side or on the other. In legal acceptation, the term 'evidence' includes all the means by which any alleged matter of fact, the truth of which is submitted to investigation, is established or disproved." (31 C.J.S., Evidence, Sec. 2.) (footnotes omitted)

Thus, legislative intent to provide the Board only with power to subpoena "evidence" which is relevant to the particular investigation or hearing before it is clear. Inherent in this is the requirement that the Board, itself, make independent use of such "evidence" to resolve some issue before it.

In *NLRB v. Kingston Trap Rock Co.,* 222 F.2d 299 (3d Cir. 1955), the employer contended that a Board agent might turn certain subpoenaed information over to a union. The court responded that to suspect a government agent of such a "wrongful act" was "brazen and insulting". 222 F.2d at 302.

In the most recent decision on this issue, *NLRB v. Q-T Shoe Manufacturing Co., Inc.,* ..... F.Supp. ..... (D.C.N.J. 1968), the court denied enforcement of a subpoena similar to the instant subpoena, and stated:

> ". . . Nowhere do Sections 11(1) and 11(2) of the Act authorize the Board to use its investigatory and subpoena powers for the sole purpose of transmitting information to certain parties to a representation proceeding, as required by the *Excelsior* rule. The plain language of Section 11(1) of the Act would appear to indicate that there must be some independent use made by the Board itself of

evidence obtained pursuant to its investigatory powers under that section. . . ."

(A copy of said decision is attached hereto as Appendix 1)

From the above, it can be seen that a common and essential element of these definitions is that "evidence" is probative of a question of fact to be decided by some tribunal, and is used by such tribunal in resolving said issue. Indeed, the legislative history of Section 11, is consistent with this standard meaning of the word "evidence", and pursuant to the rule of construction cited above, it is the meaning that the Court must use in making a determination under Section 11.

In the instant case, the Board will not make any independent use of the *Excelsior* list but will simply turn it over to the Union for use in its organizing campaign. The appellant has furnished the Board with the names of the employees for use in connection with the election. Since there were only 29 challenges to the first election, and the Union lost the election by a margin of 648 to 124, said challenges could not affect the results of the election. Since the second election was never conducted there was no issue to resolve regarding challenges. The Board has not contended that the *Excelsior* list is needed by it to determine whether a question concerning representation exists, or to determine voting eligibility. The second election was not to be conducted by mail ballot and therefore the list was not to be used by the Board for any purpose except transmittal to the Union. This is unprecedented, and is not permitted by Section 11.

If the instant subpoena is enforced on the rationale the information will "aid" employees to make a more intelligent choice, the Court, is in effect, opening to

parties in representation proceedings, through the Board, all information which they deem helpful in organizing employees. It certainly can be argued that the employer has access to information about such matters as labor and material costs, management salaries, employees' wages, production schedules, amount of overtime worked, profits, etc., which unions do not have, and that such information would aid the employees in making a more intelligent choice. It would follow that all such information is subject to subpoena in representation cases pursuant to Section 11. Such use of Section 11 would create the evils which Congress clearly sought to prevent.

Before the district court, and in other similar cases, the Board has fallen back on the weak defense of raising and refuting a false issue. It has argued that the term "evidence" under Section 11 is not limited to formal proof of disputed facts presented in a trial-type hearing. This, however, is not in issue, in that appellant admits that subpoenas permitted by Section 11 are not limited to "trial-type hearings". What appellant contends, is that "evidence" within the meaning of Section 11, must be used by the Board, itself, and must logically be limited to facts probative to an issue before the Board.

Not only has the Board not met this essential issue, but neither has the court below, or the other courts that have enforced similar Board subpoenas.* In *NLRB v.*

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* See *NLRB v. Wolverine Industries Division, Mid-State Metal Products, Inc.*, ... F.Supp. ....., 64LRRM 2187 (E.D. Mich. 1967); *NLRB v. British Auto Parts, Inc.*, 226 F.Supp. 371 (C.D. Cal. 1967); *Swift & Co. v. Solien*, 66LRRM 2038 (E.D. Mo. 1967); *NLRB v. Wyman-Gorden Co.*, 270 F.Supp. 283 (D. Mass. 1967); *NLRB v. Beech-Nut Life Savers, Inc.*, ... F.Supp. ....., 56LC ¶ 12,237 (S.D.N.Y. 1967). Cf *NLRB v. Montgomery Ward & Co.*, ... F.Supp. ....., 64LRRM 2299, 2301 (N.D. Fla. 1967).

Hanes Hosiery Division, ... F.2d ....., 56LC ¶ 12,210, (4th Cir. 1967), petition for cert. filed, 36 U.S.L. Week 3271 (U.S. Jan. 2, 1968) (No. 982), the court stated that the *Excelsior* list was "evidence" within the meaning of Section 11, without indicating how the list was relevant to any issue before the Board.

In *NLRB v. Rohlen,* ..... F.2d ....., 56LC ¶ 12,252, (7th Cir. 1967), the court stated that the "something in issue in a representation proceeding" is employee group preference, and

> ". . . An *Excelsior* list, by facilitating a fully informed electorate, is evidence which aids in the establishment of that group preference. . . . " (..... F.2d at .....)

The court was wrong. The basic things in issue in a representation proceeding are (1) what is an appropriate bargaining unit? and (2) how did the employees vote? Additional issues may arise regarding (1) the mechanics of voting; such as when, where and how the voting should take place; (2) the overt conduct of the parties which may affect the outcome of the election; and (3) challenges to ballots that could affect the results of the election. An *Excelsior* list has no probative value on these issues in a case, such as the instant case, where (a) the list was subpoenaed after the appropriateness of the unit had been resolved; (b) there were no challenges that could affect the results of the election, and (c) there were no objections to be resolved. The court also stated that the subpoena was enforceable because it touched a matter under investigation. There is nothing in the decision indicating how the list was pertinent to the matter before the Board.

Doubtless, the Board would find it convenient, after having promulgated *Excelsior,* to enforce it in the court

pursuant to Section 11 rather than to follow its traditional course of overturning elections as a means of enforcing its rules. However, convenience to an agency is not the test. Rather, the test is the statute that Congress has enacted. Congress' will can be effectuated only by denying enforcement of the subpoena.

It is submitted that since in the instant case the Board will not make independent use of the *Excelsior* list, it does not constitute "evidence," and therefore the subpoena is unenforceable.

II. THE SUBPOENA IS UNENFORCEABLE BECAUSE THE *EXCELSIOR* RULE IS INVALID

It will be shown herein that the Board was not acting within its authority when it promulgated the *Excelsior* rule, and therefore the subpoena is unenforceable.

A. The *Excelsior* Rule Is Invalid Because It Is A *Per Se* Rule In Direct Violation Of United States Supreme Court Decisions.

The Board has held that failure to supply an *Excelsior* list is, *per se,* grounds to set aside an election. The principal vice of a *per se* rule, is that it prevents the consideration of numerous relevant factors. The following statement regarding *per se* rules clearly sets forth some of the criteria which justify the establishment of a *per se* rule:

> "The substantive justification of a per se rule must rest on the fact or assumption that the gains from forbidding the specified conduct far outweigh the losses. The magnitude of this difference, plus the administrative gains, must be enough to justify the

element of arbitrariness which is always involved. This requires, first, that the harmful effects of the practice be significant; and second, either that they depend to a great enough extent on the outlawed practice so that they cannot be easily achieved in other ways, or that such ways can be anticipated and also forestalled by per se rules." (Kaysen & Turner, *Antitrust Policy* at 143.)

These factors are not present in the instant case. Numerous elections were conducted before the *Excelsior* rule was promulgated without harmful effects, and what the Board seeks to accomplish by said rule can be easily achieved by other means. The Supreme Court in *NLRB v. United Steelworkers,* 357 U.S. 357 (1958), hereinafter called *"Nutone",* and in *NLRB v. Babcock & Wilcox Co.,* 351 U.S. 105 (1956), hereinafter called *"Babcock",* has clearly indicated that *per se* rules have no place in the field of employee representation elections under the Act. In these cases, the Court held that the Board must make a full factual determination before rendering a decision — it cannot rely solely upon the fact that an employer practice existed which *may* have had the effect of closing an avenue of communication to its employees. The Court, in both cases, held that where the Board alleges an employer has interfered with a channel through which its employees may receive information from a union seeking to organize them, it must evaluate the availability of other channels of communication.

The Supreme Court in *Nutone* rejected the Board's *per se* approach in this area with the following language:

"... The very narrow and almost abstract question here derives from the claim that, when the employer himself engages in anti-union solicitation that if engaged in by employees would constitute a viola-

tion of the rule — particularly when his solicitation is coercive or accompanied by other unfair labor practices — his enforcement of an otherwise valid no-solicitation rule against the employees is itself an unfair labor practice. *We are asked to rule that the coincidence of these circumstances necessarily violates the Act, regardless of the way in which the particular controversy arose or whether the employer's conduct to any considerable degree created an imbalance in the opportunities for organizational communication. For us to lay down such a rule of law would show indifference to the responsibilities imposed by the Act primarily on the Board to appraise carefully the interests of both sides of any labor-management controversy in the diverse circumstances of particular cases and in light of the Board's special understanding of these industrial situations. . . .*" (357 U.S. at 362-363.) (Emphasis added.)

In addition, the Court thought it highly relevant that:

"No attempt was made . . . to make a showing that the no-solicitation rules truly diminished the ability of the labor organizations involved to carry their messages to the employees. . . ." (357 U.S. at 363.)

The Court also stated that:

"The Taft-Hartley Act does not command that labor organizations as a matter of abstract law, under all circumstances, be protected in the use of every possible means of reaching the minds of individual workers, nor that they are entitled to use a medium of communication simply because the employer is using it." (357 U.S. at 364.)

The Board has improperly distinguished *Babcock* and *Nutone* by arguing that in those cases the interest in

maintaining a specific channel of communication open to employees was balanced against "the employer's significant interest in controlling the use of his property and the working time of his employees." While it is true that *Babcock* concerned the right of non-employee union representatives to enter an employer's premises, and *Nutone* concerned the right of employer to conduct activities which if conducted by the employees would have been prohibited by a lawful no-solicitation rule, the Supreme Court's basic approach to problems in this area was not in any way based on these facts. The Court's unqualified requirement was that there be a detailed examination and the balancing of the specific employer practice in question against other means of communication available to the union.

In *Excelsior,* the Board stated:

> " . . . [A]s we read *Babcock* and *Nutone,* the existence of alternate channels of communication is relevant only when the opportunity to communicate made available by the Board would interfere with a significant employer interest — such as the employer's interest in controlling the use of property owned by him. *Here, as we have shown, the employer has no significant interest in the secrecy of employee names and addresses.* Hence, there is no necessity for the Board to consider the existence of alternative channels of communication before requiring disclosure of that information. Moreover, even assuming that there is some legitimate employer interest in nondisclosure, we think it relevant that the subordination of that interest which we here require is limited to a situation in which employee interests in self-organization are shown to be substantial. . . ." (156 NLRB at 1245.) (Emphasis added.)

Even if the Board's interpretation of *Nutone* and *Babcock* is correct, its conclusion that an employer has no substantial interest in a list of employees names is clearly incorrect. However, here again, because of the application of the *per se* rule, the appellant has had no opportunity to show that it has a substantial interest in such a list.

The appellant employs a large number of highly skilled employees who are essential to its operations. It is expensive to train and hard to find employees of this type in today's labor market. The names and addresses of said employees are valuable trade secrets of the appellant. The *Excelsior* rule and the subpoena require the appellant to furnish the names and addresses of these employees to the Union which represents employees of companies that compete with the appellant in the labor market, and has regular contacts with said competitors. It is apparent the appellant has a substantial interest in non-disclosure of the *Excelsior* list to the Union. The *Excelsior* rule, without providing any protection, seriously interferes with this substantial interest of the appellant.

The appellant has a further substantial interest in not revealing the names and addresses of its employees against the employees' wishes. An employer, and its employees, are not adversaries, and both have a common interest in the conduct of the business enterprise. There were, and are, numerous employees who do not want their names and addresses given to a union. For an employer to reveal such names against an employee's wishes not only violates the employee's right, but also will have a detrimental effect on his relations with its employees.

There is still another reason why the Board's position is incorrect and naive. The Supreme Court in *Nutone* and

Babcock has recognized that an employer has a substantial interest in resisting union organization, and ruled that before this interest can be invaded a full-scale inquiry, in contrast to a *per se* rule, must be made. Indeed, the court in *Babcock* stated:

> ". . . The employer may not affirmatively interfere with organization; the union may not always insist that the employer aid organization. . . ." (351 U.S. at 112.)

An employer's substantial interest in resisting organization of its employees is also implicitly recognized in Section 8(c) of the Act (29 USC § 158(c), which protects an employer's right to make anti-union speeches.

The fact that *Nutone* and *Babcock* involved unfair labor practices does not mitigate the effect of these decisions in the instant case, which concerns a representation proceeding under Section 9 — and should make no difference in determining whether an evaluation of alternative channels of communication should take place. Indeed, the Board's position in *Nutone* was stronger than its instant position because in that case the employer engaged in unfair labor practices besides allegedly closing a channel of communication. If a *per se* rule cannot apply where there are charges of unfair labor practices, it certainly can not apply in this case, where there has been no charge of unfair labor practices or other coercive employer conduct. It would be ridiculous to hold that the opportunities for communications are balanced in an unfair labor practice case, and in the same fact situation to hold that a *per se* rule should be applied in a representation proceeding. Either the existence of alternative channels is relevant or it is not.

The Board cannot seek sanctuary in its power to conduct elections. The Board does not have a *carte blanche*

to determine election rules, any more than it has to determine unfair labor practices, as numerous court decisions have demonstrated. See, *e.g., NLRB v. Schapiro & Whitehouse, Inc.*, 356 F.2d 675, 61 LRRM 2289 (4th Cir. 1966); *Bullard Co. v. NLRB,* 61 LRRM 2670 (D.D.C. 1966). Alternative means of communications must be considered and on a case-by-case basis.

It is apparent that since the Board's primary purpose is not an adequate basis for establishing a *per se* rule, the secondary purpose of reducing the number of *possible* challenges to ballots, and *possible* challenge proceedings, is certainly not an adequate reason for establishing such a rule.

A full hearing in the instant case would have revealed that the instant subpoena was not needed by the Union to get its views to the employees, and the employees had ample opportunity to receive the Union's views through available channels of communication, and to make a free, intelligent choice in the election. The employees were specifically permitted to, and informed of their right to, solicit for the Union and to distribute Union literature *during working time* so long as such activity did not interfere with production. The employees were also furnished with stamped, addressed envelopes with which they could individually mail their names and addresses to the Regional Director for use by the Union. Furthermore, the appellant offered, at its own expense, to submit a list containing the names and addresses of all eligible employees to a neutral third party who would in turn mail to such employees any communications supplied by the Union in stamped and sealed envelopes. The Union, indicating it had no interest in mailing anything to the employees' homes, did not avail itself to this offer. If the Union had accepted, it would have been in the same position as the appellant, who mailed to the employees' homes

but could not make visitations to their homes. (The Board has ruled that home visitations are coercive when engaged in by employers. *Peoria Plastics Company,* 117 NLRB 545 (1957). Now it takes the position that union visits are not. The rationale behind this position is difficult to understand, and the inequity the Board is creating clearly is arbitrary and cannot be enforced.) Lastly, it should be noted that the Union did in fact wage a vigorous campaign which included extensive handbilling of Union literature.

Under the foregoing facts, it is impossible to say that the failure of the employer to make an *Excelsior* list available to Union interfered with the employees' free choice. There is no way for the Board to escape the mandates of *Nutone* and *Babcock,* and therefore the subpoena is invalid because it is being used to enforce an invalid *per se* rule.

B. The *Excelsior* Rule, As Applied In The Instant Case, Is Invalid Because It Violates The Constitutionally Protected Right Of Privacy.

It has been shown herein that because of the appellant's actions, the Union had all means of communication available to it, including mailing its campaign material to homes, except visits to the homes of those employees who did not wish their addresses furnished to the Union. It will be shown herein that the right to be free from intrusions into the privacy of one's home is protected by the Constitution, and that the intrusion caused by *Excelsior* is violative of this protection.

In 1928, Justice Brandeis stated:

> "The makers of our Constitution undertook to secure conditions favorable to the pursuit of happi-

> ness. They recognized the significance of man's spiritual nature, of his feelings and of his intellect. They knew that only a part of the pain, pleasure and satisfactions of life are to be found in material things. They sought to protect Americans and their beliefs, their thoughts, their emotions and their sensations. They conferred, as against the Government, the right to be let alone — the most comprehensive of rights and the right most valued by civilized men." (*Olmstead v. United States,* 277 U.S. 438, 478 (1928) (dissenting opinion))

The Supreme Court has recently defined the constitutionally protected right of privacy. *Griswold v. State of Connecticut,* 381 U.S. 479 (1965). The Court stated:

> "The . . . cases suggest that specific guarantees in the Bill of Rights have penumbras, formed by emanations from those guarantees that help give them life and substance. . . . Various guarantees create zones of privacy." (381 U.S. at 484.)

This right, which is based on the First, Fourth and Fifth Amendments of the Constitution, protects all persons from unwanted and bothersome intrusion upon their private lives. In *Griswold,* a law prohibiting the use of contraceptives was held to be a violation of the "right of privacy". That right was seen by the Court to provide "protection against all governmental invasions 'of the sanctity of a man's home and the privacies of life.' " 381 U.S. at 484, citing *Boyd v. United States,* 116 U.S. 616, 630 (1886). The instant subpoena would have the effect of exposing appellant's employees to unwanted and bothersome intrusions upon their private lives — the "sanctity" of their homes would be violated. The *Excelsior* rule is a clear instance of governmental action in violation of the constitutionally protected right of privacy.

Even before *Griswold,* the Supreme Court had occassion to comment on the sanctity of a man's home. In *Public Utilities Commission v. Pollak,* 343 U.S. 451 (1952), a majority of the Court denied the constitutional claims of those who urged that their right of privacy was being invaded when a public bus company broadcasted commercial radio programs in buses. The Court did, however, recognize the distinction between a man's home and a public bus. In denying the plaintiffs' claim, the Court said:

> ". . . [Plaintiffs'] position wrongly assumes that the Fifth Amendment secures to each passenger on a public vehicle regulated by the Federal Government a right of privacy substantially equal to the privacy to which he is entitled in his own home. *However complete his right of privacy may be at home,* it is substantially limited by the rights of others when its possessor travels on a public thoroughfare or rides in a public conveyance. . . ." (343 U.S. at 464). [Emphasis added.]

In *Pollak,* Mr. Justice Douglas, wrote a long and persuasive dissent which very closely resembles the majority opinion which he wrote for the Court in *Griswold.* Justice Douglas stated:

> ". . . Liberty in the constitutional sense must mean more than freedom from unlawful governmental restraint; it must include privacy as well, if it is to be a repository of freedom. The right to be let alone is indeed the beginning of all freedom. Part of our claim to privacy is in the prohibition of the Fourth Amendment against unreasonable searches and seizures. *It gives the guarantee that a man's home is his castle beyond invasion either by inquisitive or by officious people. . . .*" (343 U.S. at 467.) (Emphasis added)

Justice Douglas noted that the right of privacy is embodied in not only the Fourth Amendment but also the First and Fifth Amendments. In essence, he felt:

> "The present case involves a form of coercion to make people listen. . . When we force people to listen to another's ideas, we give the propagandist a powerful weapon. . . Once privacy is invaded, privacy is gone. . . The right of privacy should include the right to pick and choose from competing entertainments, competing propaganda, competing political philosophies. If people are let alone in those choices, the right of privacy will pay dividends in character and integrity." (343 U.S. at 468-469.)

Chafee, in "Free Speech in the United States" (1941), 406, believed:

> "House-to-house canvassing raises more serious problems . . . The possibilities of persuasion are slight compared with the certainties of annoyance. Great as is the value of exposing citizens to novel views, *home is one place where a man ought to be able to shut himself up in his own ideas if he desires.* There he should be free not only from unreasonable searches and seizures but also from hearing uninvited strangers expound distasteful doctrines. A doorbell cannot be disregarded like a handbill. It takes several minutes to ascertain the purpose of a propagandist and at least several more to get rid of him. . . ." (Emphasis added)

The right of privacy is intimately connected with the right against disclosure of names which has been protected by the Supreme Court, absent some compelling national or state interest in favor of disclosure. See *Tally v. California,* 362 U.S. 60, 66 (1960) (Harlan, J., concurring); *Bates v. City of Little Rock,* 361 U.S. 516

(1960); *NAACP v. Alabama Ex. Rel. Patterson,* 357 U.S. 449, 463-64 (1958); *Sweezy v. New Hampshire,* 354 U.S. 234, 265 (1957) (Frankfurter, J.) See McKay, The Preference for Freedom, 34 N.Y.U.L. Rev. 1183, 1222 (1959). There is no such compelling interest in the instant case because the Union had a substantial opportunity to communicate.

In the instant case, the only purpose of the *Excelsior* rule is to permit the union to visit the employees at their homes. There is no provision under the rule which protects employees who do not desire such contacts. While employees can refuse to accept union literature and turn their backs on union visitors, it is the right to be free from unwanted or bothersome intrusions that is protected by the Constitution, and the fact that employees can fend off intrusion is irrelevant. The *Excelsior* rule is invalid because it causes the intrusion.

In spite of the fact that the Board is acting in an area which is constitutionally protected, it has chosen to proceed on the basis of a *per se* approach. Instead of evaluating all factors to determine if an *Excelsior* list is needed by the Union to effectively communicate with employees, the Board has ruled that a list must be supplied in every case. As has been shown herein, this *per se* approach is improper under the Act. The invalidity of an all encompassing rule which infringes upon constitutional rights is clear. *Tally v. California,* 362 U.S. 60 (1960); *Cantwell v. Connecticut,* 310 U.S. 296 (1940); *Schneider v. State,* 308 U.S. 147; *Hague v. CIO,* 307 U.S. 496 (1939); *Lovell v. City of Griffin,* 303 U.S. 444 (1938).

The appellant has standing to raise this issue of deprivation of the constitutionally protected right of privacy. The average employee has no effective means of enforcing said right against the intrusion directly caused by

Excelsior. Most employees are unaware of the rule. They are not parties to representation proceedings and therefore their constitutional rights will be infringed upon without notice. In addition, an individual employee not only must bear the expense of retaining an attorney and fighting a lengthy and costly battle with the Board, he must also single himself out among his fellow employees as a person who does not support, or want to have any contacts with, the union. The instant situation is similar to the one in *Barrows v. Jackson,* 346 U.S. 249 (1953), where the court stated:

> ". . . [W]e are faced with a unique situation in which it is the action of the state court which might result in the denial of constitutional rights and in which it would be difficult if not impossible for the persons whose rights are asserted to present their grievance before any court. Under the peculiar circumstances of this case, we believe the reasons which underlie our rule denying standing to raise another's rights, *which is only a rule of practice,* are outweighed by the need to protect the fundamental rights which would be denied by permitting the damages action to be maintained." (346 U.S. at 257.) (Emphasis added)

The Board, by the *Excelsior* rule, has made the appellant its instrumentality to effectuate an unconstitutional invasion of employees' privacy. Thus, it is clear that the appellant has standing to assert the constitutional rights of its employees, and refuse to be such an instrumentality.

The appellant's standing to assert this matter has been recognized by the Supreme Court. *Gibson v. Florida Investigating Committee,* 372 U.S. 539 (1963); *Bates v. City of Little Rock,* 361 U.S. 516 (1960); *NAACP v. Alabama,* 357 U.S. 449 (1958); *Barrows v. Jackson,* 346

U.S. 249 (1953); *Pierce v. Society of Sisters,* 268 U.S. 510 (1924).

The Court in *NAACP v. Alabama, supra,* was concerned with the effect disclosure of membership lists would have upon the exercise of freedom of association. The probability of interference with an employee's constitutional right of privacy is surely as great as a result of the *Excelsior* rule, as the probability of interference with freedom of association was by disclosure in *NAACP v. Alabama, supra.*

It is submitted that by permitting each of its employees to decide for himself whether he wanted the Union to have his name and address, the appellant did all it could constitutionally be required to do, and that therefore the subpoena is unenforceable.

C. The *Excelsior* Rule Is Invalid Because It Was Promulgated Without Publication In The Federal Register, As Required By The Administrative Procedure Act (5 USC § 1003, et seq.)

The relevant statutory provisions concerning the procedure an administrative agency must follow in promulgating rules are set forth in Sections 3(a) and 4(a) of the Administrative Procedure Act, 5 USC §§ 1002(a), 1003(a) (1964).

Section 2(c) of the Administrative Procedure Act, 5 USC § 1001(c) (1964), defines a rule to mean:

> "... the whole or any part of any agency statement of general or particular applicability and future effect designed to implement, interpret, or prescribe law or policy. . . ."

From the statutory language itself, the general plan of Congress is clear. It intended that agencies make public through the Federal Register proposed rule making and adopted rules, and that specific sanctions would exist to enforce the notice requirements.

The Board, in *Excelsior,* has adopted a rule within the meaning of Section 2(c) of the Administrative Procedure Act, *supra.*

When the Board found that *Excelsior* presented "a question of substantial importance in the administration of the National Labor Relations Act", it directed the parties to focus upon the question of providing names and addresses to the union before rendering its decision. The Board further invited certain interested parties to file *amicus curiae* briefs and to participate in all arguments. Then, in announcing the *Excelsior* policy, the Board said, "we now establish a requirement that will be applied in all election cases." 156 NLRB at 1239. It set out the procedures that are to be followed for the implementation of this policy and provided that if they are not complied with this would mean the setting aside of an election. It noted:

> "However, the rule we have here announced is to be applied prospectively only. It will not apply in the instant cases, but only in those elections that are directed, or consented to, subsequent to 30 days from the date of this Decision. We impose this brief period of delay to insure that all parties to forthcoming representation elections are fully aware of their rights and obligations as here stated." (*Id.* at 1240, n. 5.)

Thus, the Board acknowledged that it was making a rule, deliberately made it broadly applicable to future cases, and clearly did not apply it to the facts before it.

Clearly, the Board's *Excelsior* is a "rule", adopted by rule making. Since this is the case, the Board had to comply with §§ 3 and 4 of the Administrative Procedure Act.

The Board failed to comply with Section 4(a) of the Administrative Procedure Act by failing to publish a general notice of its then proposed *Excelsior* rule in the Federal Register. In addition, it then failed to comply with Section 3(a) of the Administrative Procedure Act by failing to publish the rule in the Federal Register. The Ninth Circuit Court of Appeals, in *Hotch v. United States,* 212 F.2d 280 (9th Cir. 1954), quoted the following legislative history:

> "'. . . In the 'rule making' (that is, 'legislative') function it [the Administrative Procedure Act] provides that with certain exceptions agencies must publish notice and at least permit interested parties to submit their views in writing for agency consideration *before the issuance of general regulations* . . . [italics ours].' U.S. Code Congressional Service, 79th Congress, Second Session, 1946, p. 1195, at 1205." (212 F.2d at 282.)

The court then noted that in the particular facts before it, neither notice of proposed rule making nor publication of the adopted rule had been performed by the agency. It asserted that both were necessary prerequisites to the effective issuance of a regulation, and that "if a rule has not been issued, it has no force as law." (212 F.2d at 284.)

The failure of the Board to so publish removes the duty of the appellant to comply with the *Excelsior* rule, and precludes the Court from enforcing the subpoena. *Hotch v. United States,* supra. In a more recent case, *Gonzales v. Freeman,* 334 F.2d 570 (D.C.Cir. 1964),

the court refused to enforce an agency rule because of the agency's failure to comply with the publication requirements of the Administrative Procedure Act.

In *NLRB v. Majestic Weaving Co.,* 355 F.2d 854 (2d Cir. 1966), the court criticized the Board for failing to live up to its obligation under the Administrative Procedure Act. It said the Board ought to take the hint of the Supreme Court in *SEC v. Chenery,* 332 U.S. 194 (1947), in the exercise of its important power of prospective rule making, and that it ought to do it in accordance with the requisites of the Administrative Procedure Act.

It is true that the Board may well adopt the same rule as it has, if it goes through the motions of another rule-making proceeding following proper notice. However, if defendant, and employers generally, not merely the selected representative groups who had been invited before, were able to participate or at least send their views to the Board, then the Board might be induced or inclined to feel differently about the matter.

Therefore, the *Excelsior* rule should be set aside to avoid prejudice, not only to the appellant, but also to others in its position, who were not apprised of the impending rule formulation in the manner that Congress so intended.

III. IRRESPECTIVE OF WHETHER OR NOT THE *EXCELSIOR* RULE IS VALID, THE APPELLANT HAS SUBSTANTIALLY COMPLIED THEREWITH AND THEREFORE THE SUBPOENA IS UNENFORCEABLE.

The Board has very recently stated:

> ". . . we find nothing in our Decision in *Excelsior* which would require the rule stated therein to be mechanically applied. . . ." (*Program Aids Company, Inc.,* 163 NLRB No. 54 (1967).)

The rule that *Excelsior* should not be applied mechanically was also upheld by the Board in *Valley Die Cast Corp.,* 160 NLRB No. 142 (1966). However, irrespective of the validity of *Excelsior,* it is apparent that the Board has violated its own decisions, and applied *Excelsior* mechanically in the instant case.

The alleged purpose behind such rule is to provide an atmosphere in which employees will have maximum opportunity to make an informed choice in representation elections. The appellant has done more than is required by the rule with respect to giving the Union an opportunity to have its views reach the employees.

It is therefore submitted that while the appellant has not complied with the letter of the *Excelsior* rule, it has more than substantially complied with the spirit and purpose of the rule, and for this reason the subpoena is unenforceable.

CONCLUSION

For the reasons hereinabove set forth, the Court should reverse the decision to the lower court, and order the instant action dismissed.

Respectfully submitted,
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CERTIFICATE

I certify that, in connection with the preparation of this brief, I have examined Rules 18, 19 and 39 of the United States Court of Appeals for the Ninth Circuit, and that, in my opinion, the foregoing brief is in full compliance with those rules.

SEYMOUR SWERDLOW

Seymour Swerdlow

APPENDIX I

DECISION OF U.S. DISTRICT COURT, DISTRICT OF NEW JERSEY, IN CASE OF NLRB v. Q-T SHOE MANUFACTURING CO., INC., ET AL.

UNITED STATES DISTRICT COURT
DISTRICT OF NEW JERSEY

CIVIL ACTION NO. 140-67

National Labor Relations Board

Plaintiff

vs.

Q-T Shoe Manufacturing Co., Inc. and
Martin S. Nadler as President of
Q-T Shoe Manufacturing Company, Inc.

Defendants.

OPINION

COOLAHAN, District Judge:

This matter came before the court upon the complaint of the National Labor Relations Board (hereinafter referred to as "Board"), seeking enforcement of a subpoena *duces tecum* directed to defendant Martin S. Nadler as President of Q-T Shoe Manufacturing Company, Inc., (hereinafter refered to as "Q-T Shoe"), or in the alternative a mandatory injunction compelling defendant Q-T Shoe to produce the same material sought under the subpoena *duces tecum*. Jurisdiction of this court is involved under 28 U.S.C. § 1337 and Sections 9(c) and 12 (2) of the National Labor Relations Act (hereinafter referred to as "the Act"), 29 U.S.C. §§ 159(c), 161 (2).

The material facts are as follows: The Board is an administrative agency created under the Act and empowered and directed to administer the provisions of that statute, including investigation of questions pertaining to employee representation and representation elections under Section 9 of the Act, 29 U.S.C. § 159. Q-T Shoe is an employer engaged in the manufacture of shoes in interstate commerce within the meaning of the Act, 29 U.S.C. § 152 (6), (7). The company's plant in question is located within this judicial district, at Patterson, New Jersey.

On September 20, 1966, Joint Council No. 3 of the United Shoe Workers of America AFL-CIO (hereinafter referred to as "Union"), petitioned the Board's regional office at Newark, New Jersey for a representation election to establish its alleged majority support by the employees at the Paterson Plant, and to obtain certification as their collective bargaining representative.

The regional office conducted an investigation of the petition and a hearing was held on the question of representation. Thereafter, on November 25, 1966, the Regional Director issued a Decision and Direction of Election pursuant to Section 9(c) (1) of the Act, 29 U.S.C. § 159(c)(1), which directed that an election be held for a unit of approximately 250 production and maintenance employees at the plant. The election was to be conducted by the Board and in accordance with the National Labor Relations Act, the Board's Rules and Regulations, and the applicable procedure and policies of the Board.

Pursuant to the Board's rule in *Excelsior Underwear, Inc.,* 156 N.L.R.B. No. 111 (1966), the Board ordered Q-T Shoe to furnish it with a list of names and addresses of all employees eligible to vote in the election. On December 2, 1966, Q-T Shoe notified the Board's Regional Director that it would not comply. By letter of December 5, 1966, the Union notified the Director that it did not want to proceed to election until the information was furnished. Thereafter, the Regional Director issued the instant subpoena *duces tecum* on December 19, 1966, pursuant to Section 11(1) of the Act, 29 U.S.C. § 161(1).[1]

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[1] Section 11 of the Act, 29 U.S.C. § 161, provides that:

> For the purposes of all hearings and investigations, which, in the opinion of the Board, are necessary and proper for the exercise of the powers vested in it by sections 159 [Section 9, "Representatives and Elections"] and 160 [Section 10, "Prevention of Unfair Labor Practices"] of this title—
>
> (1) The Board, or its duly authorized agents, . . . shall at all reasonable times have access to, for the purpose of examination, and the right to copy any evidence of any person being investigated or proceeded against that relates to any matter under investigation or in question. The Board, or any member thereof, shall upon application of any party to such proceedings, forthwith issue to such party subpenas requiring

The subpoena directed the defendant Martin Nadler, President of Q-T Shoe, to produce and make available to the Board's regional office the company's personnel and payroll records, or alternatively a list of all employees eligible to vote in the election. It was personally served upon Mr. Nadler on December 19, 1966.

Although Section 11(1) of the Act, *supra,* and Section 102.31(b) of the Board's Rules and Regulations, 29 C.F. R. 102.31(b), provide for a period of 5 days after service of the subpoena within which any person served who wishes to object may petition the Board to revoke the subpoena. Nadler did not file such revocation petition within five days. Further, Nadler did not appear on December 28, 1966, the return date of the subpoena, and has at all times refused to produce the materials called for therein. Consequently, the Board seeks judicial enforcement by this court of the subpoena *duces tecum,* pursuant to Section 11(2) of the Act, 29 U.S.C. § 161(2).[2]

> the attendance and testimony of witnesses or the production of any evidence in such proceeding or investigation requested in such application. Within five days after the service of a subpena on any person requiring the production of any evidence in his possession or under his control, such person may petition the Board to revoke, and the Board shall revoke, such subpena if in its opinion the evidence whose production is required does not relate to any matter under investigation, or any matter in question in such proceedings, or if in its opinion such subpoena does not describe with sufficient particularity the evidence whose production is required.

[2] Section 11(2), 29 U.S.C. § 161(2), provides in its pertinent parts:

> In case of contumacy or refusal to obey a subpoena issued to any person, any district court of the United States . . . within the jurisdiction of which the inquiry is carried on or within the jurisdiction of which said person guilty of contumacy or refusal to obey is found or resides or transacts business, upon

The Board alleges that the information sought by the subpoena constitutes evidence relevant to a Board investigation within the meaning of Sections 11(1) and 11(2) and that therefore this court should direct the defendants' compliance.

As an alternative to the requested subpoena enforcement, the Board seeks a mandatory injunction directing divulgence of the names and addresses, on the ground that under 28 U.S.C. § 1337 this court has jurisdiction over actions brought by the Board to enforce valid election rules in effectuation of the policies of the Act.[3] It is the Board's position that this provision vests this court with the power to grant it injunctive assistance in the Board's effort to carry out its authorized duty of supervising elections, despite the absence of any express grant of power to the Board to request injunctive relief for this purpose under the Board's enabling legislation.

The defendants have presented several separate defenses to the complaint, and, in addition, have moved to add as further defendants the approximately 250 employees whose addresses are sought by the Board. I am of the opinion, however, that the motion should be denied and the issues raised by the parties to the present proceeding should be resolved. In making such a ruling, the

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application by the Board shall have jurisdiction to issue to such person an order requiring such person to appear before the Board, its members, agent, or agency, there to produce evidence if so ordered, or there to give testimony touching the matter under investigation or in question. . . ."

[3] Section 1337 provides that:

The district court shall have jurisdiction of any civil action or proceeding arising under any Act of Congress regulating commerce or protecting trade and commerce against restraints and monopolies.

question for the court to determine is whether the employees "[claim] an interest relating to the subject of the action and [are] . . . so situated that the disposition of the action in [their] . . . absence may . . . as a practical matter impair or impede [their] . . . ability to protect that interest. . . ." Rule 19, Federal Rules of Civil Procedure. Defendants contend that the disclosure of the employees' addresses arguably violates their right of privacy under the Due Process Clause of the Fifth Amendment of the Constitution, since to provide the Union with the addresses will subject them to the dangers of harassment and coercion in their homes. In disposing of the defendants' motion, however, it is not necessary for the court to reach the merits of the constitutional right asserted above, or the specific grievance from which the alleged constitutional right arises. Rather, the court need only inquire into the question of whether the disposition of the present action in the absence of the employees will effectively preclude them from protecting their interests later on. The court is of the opinion that this question must be answered in the negative. Whatever the outcome of the present proceeding, and whether or not disclosure of the employees' addresses to the Union in and of itself violates the employees' right of privacy, the employees will be free in the future to petition the Board for a remedy to prevent any alleged harassment and coercion by the Union resulting from such disclosure. Defendants' motion is therefore denied.

My ruling above settles neither the question whether the Board's act of supplying the Union with a list of the employees' addresses violates the employees' constitutional rights, nor whether the defendants have standing to assert such rights. These questions are taken up in a later portion of the court's opinion.

I.

Prior to considering the Board's application for enforcement of its subpoena *duces tecum,* it would be helpful to briefly review the background of the *Excelsior* rule, the particular rule in dispute. As has been adverted to earlier, it emanates from the Board's decision in *Excelsior Underwear Inc.,* 156 N.L.R.B. No. 111 (1966). Under the *Excelsior* rule, an employer must furnish the Regional Director with a list of names and addresses of all employees eligible to vote in the election, within 7 days after the Regional Director's approval of the election agreement or after the close of the determinative payroll period for eligibility purposes, whichever is later. The list is to be given to all parties, specifically including the union, in order to promote and maximize communication of election issues to the employees and also to aid in challenging possibly ineligible voters. The rule further provides that an employer's failure to file the required list of employees' names and addresses "shall be grounds for setting aside the election whenever proper objections are filed." *Excelsior Underwear, supra* at 5.

It is now essential to turn to the problem of whether a federal district court, pursuant to Section 11(2) of the National Labor Relations Act, 29 U.S.C. § 161(2), may enforce a Board-issued subpoena directing the employer to produce the list of names and addresses required by the *Excelsior* rule. The answer to this question does not turn on the validity of the rule itself, but rather, on whether the information sought by the Board is "not plainly incompetent or irrelevant to any lawful purpose. . . . " *Endicott Johnson Corp. v. Perkins,* 317 U.S. 501, 509 (1943). "The control of the election proceeding, and the determination of the steps necessary to conduct that election fairly . . . [are] matters which Congress entrusted to the Board alone." *NLRB v. Waterman S. S. Corp.,*

309 U.S. 206, 226 (1940). The purpose behind the Board's passage of the *Excelsior* rule was to make certain that employees are able to exercise an informed and reasoned choice after hearing all sides of the question concerning the desirability of Union representation, and to facilitate the process of investigating challenges to voter eligibility.

Keeping in mind the holding of the *Waterman* case, it cannot be said that the Board's purpose for seeking the information herein is an unlawful one.

Defendants contend, however, that the subpoena should not be enforced because it seeks information the disclosure of which is required by a rule which was not formulated in accordance with the rule-making requirements specified in Section 3(a) (3) and (4) of the Administrative Procedure Act, 5 U.S.C. §§ 552 (a) (3), 553. The short answer to this objection, however, is that the Administrative Procedure Act permits the Board to proceed by either rule-making or adjudication. See *SEC v. Chenery Corp.*, 332 U.S. 194, 201-203 (1947). Moreover, in determining whether a subpoena should be enforced under Section 11 of the National Labor Relations Act, the court is of the opinion that the preceding conclusion is not weakened by the fact that the *Excelsior* rule was given a prospective application by the Board.

Defendants further assert that the subpoena should not be enforced for the reason that the disclosure of the employees' names and addresses required by the *Excelsior* rule is an unlawful abridgment of the employees' right of privacy under the Fifth Amendment of the Federal Constitution. The court will assume, but does not decide, that the defendants have standing to raise this question on behalf of the employees.

The right of privacy has been the subject of very recent and prolonged debate. See, e.g., *Lamont v.*

Comm'r of Motor Vehicles, ... F. Supp. ..... (S.D. N.Y. 1967); *Symposium on the Griswold Case and the Right of Privacy,* 64 Mich. L. Rev. 197 (1965). The court's investigation of several authorities indicates that there is no decision squarely on point with the facts of the present case. The Board relies heavily on *Martin v. City of Struthers,* 319 U.S. 141 (1943), for the proposition that, assuming that the Union intends to utilize the aforementioned list of names and addresses for the purpose of conducting door to door campaign solicitations, any interest the employees may have in preventing such a practice can only be preserved by their legally protected right to turn members of the Union away from their doors. The decision in *Struthers,* however, is inapposite. In that case, the Supreme Court struck down a local ordinance prohibiting door-to-door canvassing, on the ground that, on balance with the first amendment right relied upon by the defendant, the privacy right supported by the statute must fail. In the present case, the weighing to be done, in contrast, is between the privacy right and a statutorily based right given to labor unions to seek employee support, and the *Struthers* decision is no support for the plaintiff's position.

The decision in *Breard v. Alexander,* 341 U.S. 622 (1950), cited by the defendants, is not, in the court's opinion, an authority having any direct bearing on the resolution of the immediate issue. The *Breard* case involved an ordinance prohibiting commercial solicitation from door-to-door without previous permission of home owners. In upholding the constitutionality of the ordinance, the Supreme Court ruled merely that the community's attempt to restrict one form of commercial activity was a valid measure under the police power and not a violation of due process. There is no basis upon which it can be argued that the *Breard* opinion affords

constitutional protection for the interest asserted on behalf of the employees in the present case.

Public Util. Comm'n v. Pollak, 343 U.S. 451 (1952), is more in point. There, the United States Supreme Court, considering the question of whether commercial radio broadcasting to captive audiences in publicly franchised buses and street cars was an unwarranted and unconstitutional intrusion upon the privacy of unwilling listeners who use public transportation, concluded that no right of privacy was violated. It is quite possible that the holding of this case precludes, a *fortiori,* any conclusion in the present case that the employees' right to privacy would be violated by the divulging of their names and addresses, for the captive circumstances faced by the employees in the present case are not comparable, from the point in view of *degree of captivity,* with those faced by the bus riders in Pollak, since the employees here have a legally enforceable right to remove unwanted intruders from their homes. On the other hand, it could be argued that the *quality* of the violation of the right to privacy is greater in the present case, where it is the security of the home which may be possibly violated, as opposed to the tranquility of the bus ride. There is no need, however, to finally determine the right of privacy question here, in view of the court's determination of the other issues before it, which will follow.

Having decided that the Board's issuance of the subpoena was lawful within the meaning of *Endicott Johnson, supra,* because it was based on a reasonable policy determination within the purview of the Board's powers, question still remains as to whether this court has jurisdiction pursuant to Section 11(2) of the Act, 29, U.S.C. § 161(2), to order the defendants to produce the previously referred to list of names and addresses. Resolution of this issue depends on whether, within the

meaning of Section 11(1) of the Act, 29 U.S.C. § 161(1), the Board is seeking *"for the purpose of examination . . .* evidence *. . . that relates to any matter under investigation or in question."* A representation proceeding conducted by the Board pursuant to Section 9 of the Act, 29 U.S.C. § 159, is certainly an "investigation" within the meaning of Section 11(1), the object of which is to determine the appropriate bargaining unit for a given group of employees. *Inland Empire Council v. Willis,* 325 U.S. 697, 707 (1944). The direction of an election is merely an intermediate step in the investigation, certification being the final and effective act. *Labor Board v. International Bhd. of Elec. Workers,* 308 U.S. 413, 414 (1939).

The Board argues that the employees' names and addresses are properly classified as evidence relating to a matter under investigation to the extent that the list will be utilized by the *Union* for the purpose of communicating election issues and handling challenges to voter eligibility. This is not so. [Nowhere do Sections 11(1) and 11(2) of the Act authorize the Board to use its investigatory and subpoena powers for the sole purpose of transmitting information to certain parties to a representation proceeding, as required by the *Excelsior* rule. The plain language of Section 11(1) of the Act would appear to indicate that there must be some independent use made by the Board itself of evidence obtained pursuant to its investigatory powers under that section.] Nor does the court regard *FCC v. Schreiber,* 381 U.S. 279 (1965), or *NLRB v. Friedman,* 352 F.2d 545 (3d Cir. 1965), as being dispositive of the issue.

The facts of the present case are distinguishable from those presented in both the *Schreiber* and *Friedman* cases, in that here the Board is seeking to act as a mere conduit of the information to the Union. Although the

court is of the opinion that it is proper for the Board to have the names of all employees of Q-T Shoe, so that those entitled to vote be properly identified, judicial enforcement of the Board's subpoena in the present case would effectively result in the enforcement of the *Excelsior* rule itself; it was certainly not the intention of Congress under Section 11 (2) to confer jurisdiction upon federal courts for the disguised purpose of enforcing the Board's rules of decision. Whether the *Excelsior* rule should be enforced is a separate question which is governed by other considerations, to which the court presently turns.

II.

In the alternative to its request for subpoena enforcement, the Board seeks a mandatory injunction directing the defendants to file the list of employees' names and addresses with the Regional Director, in compliance with the Board's *Excelsior* rule. Jurisdiction of the court is invoked under 28 U.S.C. § 1337, which vests district courts with jurisdiction "of any civil action or proceeding" arising under any Act of Congress "regulating commerce or protecting trade and commerce against restraints and monopolies." The Board argues that this provision empowers this court to issue an injunction, enforcing the *Excelsior* rule, despite the absence of any express grant of district court jurisdiction under the Board's enabling act. That the present suit is a "civil action or proceeding" arising under an Act of Congress "regulating commerce," cannot, of course, be denied. *Capital Service Inc. v. NLRB,* 347 U.S. 501 (1954). The pivotal question to be determined, however, is whether provisions of the Act authorizing federal courts to enforce certain orders issued by the Board themselves deprive this court of jurisdiction of the present suit. Stated

differently, does the Act itself impliedly preclude the judicial enforcement of decisions rendered by the Board pursuant to its power under Section 9 to conduct representation proceedings? This requires some discussion.

Under the Act, the Board is given the task of performing two principal functions. The first, under Section 9, is the certification of an appropriate bargaining unit of employees; the second, under Section 10, is the prevention of unfair labor practices enumerated in Section 8. Section 9 (c) authorizes the Board to conduct an investigation upon the filing of a representation petition, and, if the Board finds that a question of representation exists, to direct an election by secret ballot and certify the results. In addition, the Board is responsible for the implementation of those steps necessary to conduct the election. See *Waterman v. NLRB, supra.* Section 9, complete in itself, contains no provision for the court enforcement of a Board order issued pursuant to that section. Section 9(d) states, however, that whenever an order of the Board is made pursuant to Section 10(c) directing any person to cease an unfair practice, and there is a petition for enforcement of the order by a court, the Board's "certification and the record of such investigation" is to be included in the transcript of the entire record required to be filed under Section 10(e), and the decree of the court enforcing, modifying, or setting aside the order of the Board is to be made and entered upon the pleadings, testimony, and proceedings set forth in the transcript.

The statutory procedure for the prevention of unfair labor practice is found in Section 10 of the Act. Section 10(a) authorizes the Board to prevent persons from engaging in unfair labor practices. Section 10(b) lays down the procedure by the Board when any person is charged with engaging in an unfair labor practice. If, as a result of the proceedings conducted pursuant to 10

(b), the Board is of the opinion that the person so charged has engaged in an unfair labor practice, Section 10(c) empowers the Board to issue an order directing that person to cease the particular practice. Section 10 (e) is a provision which authorizes the Board to petition the appropriate federal court of appeals for the enforcement of its order prohibiting an unfair labor practice.

Whether this court has jurisdiction to enforce the Board's *Excelsior* rule depends on the construction and meaning to be given to Sections 9(d) and 10(e) of the Act. A fair reading of these two sections leads the court to conclude that Congress has authorized federal courts to enforce Section 9 orders of the Board only where such an order serves as the basis for the court enforcement of a Board order restraining an unfair labor practice. This follows implicitly from the fact that: 1) only Section 10 of the Act permits the Board to seek court enforcement of its orders; 2) Section 9 orders *have* been made judicially enforceable, under the Act, when they are part of a record under Section 10, and sought to be enforced for the purpose of preventing unfair labor practices. One can only conclude, in attempting to glean congressional intent in the case of a thoroughly written and far-reaching statute such as the National Labor Relations Act, that Congress meant what it said, and only what it said, and intended to exclude what it did not say. Thus, enforcement of the *Excelsior* rule can only occur after it has been properly determined by the Board that the refusal by the defendant to provide the Union with a list of its employees' names and addresses constitutes an unfair labor practice under Section 8(a)(1) of the Act, 29 U.S.C. § 158(a)(1).

The Board argues, however, that it should not at this time be compelled to find that such a refusal by the defendants violates Section 8(a)(1) of the Act. More

specifically, it insists that the standards evolved by the Board for purposes of the regulation of elections under Section 9 differ considerably from those standards utilized to administer the unfair labor practice provisions of the Act. Thus, the Board contends that the defendants' non-compliance with the *Excelsior* rule, while improper conduct during the pendency of a representation proceeding, might not be conduct sufficient to constitute an unfair labor practice. Assuming the correctness of this argument, I am of the opinion that it should be addressed to Congress and not to this court. The distinction urged by the Board does not appear to be one which Congress has recognized under Sections 9(d) and 10(e) of the Act. These sections, as interpreted by this court, confer jurisdiction upon Federal Courts of Appeals to enforce a Board order regulating the conduct of a representation proceeding only insofar as it forms the basis of an enforceable order issued pursuant to Section 10(c) of the Act.

I am therefore of the opinion that this court is without jurisdiction to enforce the *Excelsior* rule, and plaintiff's request for a mandatory injunction is denied.

Let an appropriate order be submitted.